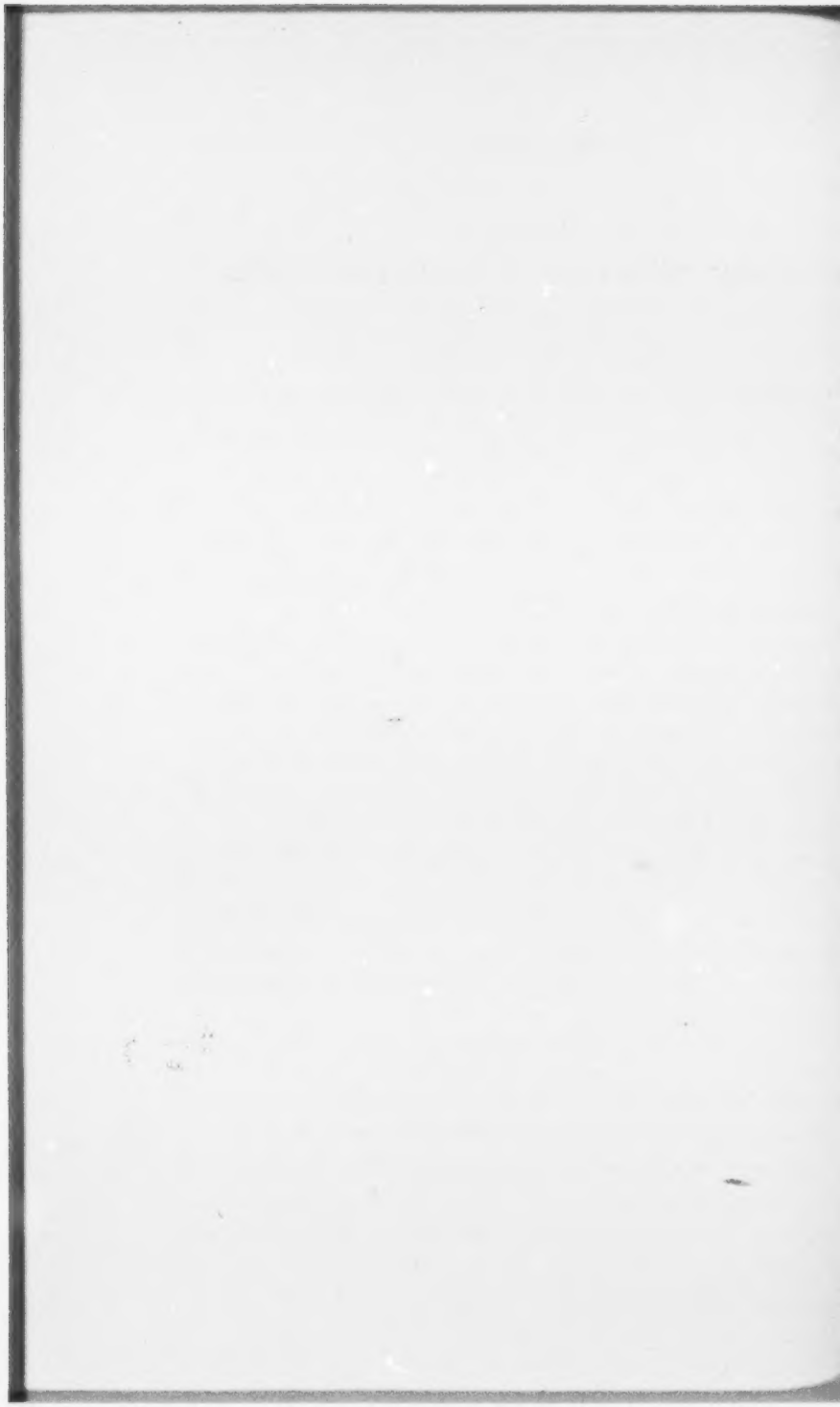

No. 620.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,
Petitioners,

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,
Respondents.

BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

OPINIONS BELOW.

The Superior Court of Cook County, Illinois, entered its order from which appeal was taken, without filing written opinion. The order appears in the Record at page 57. The

opinion of the Appellate Court of Illinois, First District, was reported in abstract form at 305 Ill. App. 288, and appears in full in petitioners' Petition to the Supreme Court of Illinois for Leave to Appeal, pages 1-9. Leave to appeal therefrom was denied October 16, 1940, by the Illinois Supreme Court without opinion.

I.

STATEMENT OF THE CASE.

Petitioners instituted suit in the Superior Court of Cook County, Illinois, against 8 different defendants (R. 1) for recovery of damages in connection with defaults occurring on bonds of Ashland Industries Building Corporation in connection with the administration of the trust created by the trust indenture under which said bonds were issued, in connection with the activities of the committee formed for the protection of the holders of said bonds, and so forth, aggregating seven or eight alleged causes of action (R. 1-20). Motions were made by the several defendants to strike and dismiss the bill of complaint upon a number of grounds; on January 18, 1939 the motions to dismiss were sustained, and leave was given to the plaintiffs to amend (R. 20). Thereafter petitioners filed an amended complaint against the same defendants (R. 20-38). Motions to strike and dismiss the amended complaint were again filed by the several defendants upon a number of grounds (R. 39-57). Motion of this respondent to dismiss was, *inter alia,* upon grounds that the amended complaint did not show any duty or obligation upon respondent, *that plaintiffs had not alleged facts sufficient to constitute a valid cause of action nor to support a judgment against it, nor to entitle plaintiffs to the relief sought,* that it did not show that defendant was a party to the action of *Slocum* v. *Rothschild,* described in paragraph 6 of the amended complaint (R. 26), nor to the action of *Security National Bank of Sheboygan,* v. *Roth-*

schild, described in paragraph 8 of the amended complaint (R. 28), and that therefore, as to this respondent, all matters pertaining thereto should be stricken, that as to those actions, the matters therein having been adjudicated, the same were *res judicata,* and further *that the amended complaint failed to comply with certain rules of pleading set forth in subparagraph 2 of Section 33 of the Civil Practice Act of Illinois.* (The motion is set forth in abbreviated form at R. 57.) On April 10, 1939 the Supreme Court of Cook County granted "each and every motion to strike the amended bill of complaint" and ordered the same stricken and the cause dismissed at plaintiffs' cost (R. 57-58).

QUESTION PRESENTED.

The question presented is twofold: 1st, whether the state court in ordering the amended complaint of petitioners to be stricken and the case dismissed, did so upon adequate and sufficient grounds not involving any federal question; and 2nd, if the former be found in the affirmative, whether this Court may, despite such finding, assume jurisdiction of this case should it likewise find a federal question to be involved and to have been properly raised.

II.

SUMMARY OF ARGUMENT.

The amended complaint was ordered by the Superior Court of Cook County, Illinois, to be stricken and the case dismissed upon motion of respondent to strike and dismiss upon grounds, *inter alia,* that it failed to state a cause of action and failed to comply with certain mandatory rules of pleading under the Civil Practice Act of the State of Illinois. The order of the Superior Court fully sustained these grounds for respondent's motion. It was affirmed by the Appellate Court of Illinois, First District, and made final by the refusal of the Illinois Supreme Court to grant leave to appeal.

Each of the grounds above set forth was sufficient to sustain an order striking the amended complaint and dismissing the action, and the action of the state court in connection therewith is not reviewable here. There was, therefore, as to this respondent, no federal question involved, and the jurisdiction of this Court may not be invoked.

ARGUMENT.

1. No grounds exist upon which the jurisdiction of this Court may be invoked.

Section 237b of the Judicial Code (28 U. S. C. A. Sec. 344b) is the authority under which this Court may review the decision of a state court, and is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had where is drawn in question the validity of a statute or treaty of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States or any treaty or statute of, or commission held or authority exercised under, the United States, and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

This Court has consistently ruled that, since it is only by statutory provision that the Supreme Court of the United States may review a decision of a state court, that Statute must be strictly construed.

Caperton v. *Ballard,* 14 Wall. 238.

In *Caperton* v. *Ballard, supra,* this Court stated at page 241:

> "This Court has repeatedly declared that it is only under the 25th Section of the Judiciary Act that it takes cognizance of error committed in the highest courts of a state."

and further at page 242:

> "It is only through the instrumentality of the statute that the clause of the Constitution which the plaintiff in error relies on, can be invoked for his protection."

The principle above enunciated by this Court has been so consistently followed that no purpose would be served by the citation of additional cases.

Respondent moved to dismiss the amended complaint upon the ground of the failure of the plaintiffs to allege facts sufficient to sustain a cause of action or to support a judgment against respondent, or to otherwise entitle the plaintiffs to the relief sought; respondent likewise moved to dismiss the amended complaint upon the ground of the failure of the amended complaint to comply with the requirements of subparagraph 2 of Section 33 of the Civil Practice Act of Illinois; respondent likewise raised the point that all matters set forth in paragraphs 5, 7 and 17 of the amended complaint (R. 25, 27 and 36) had been adjudicated in the United States District Court and were *res judicata,* and further that all matters contained in paragraphs 6 and 8 to 16, inclusive, of the amended complaint, should be stricken for the reason that plaintiffs had not shown respondent to be a party to the action of *Slocum* v. *Rothschild,* described in paragraph 6, nor to the action of *Security National Bank* v. *Rothschild,* described in paragraph 8, of the amended complaint, to which actions said paragraphs referred. At R. 57 respondent's motion to dismiss is set forth in abbreviated form.

It is obvious that the motion to dismiss for failure to allege facts sufficient to sustain a cause of action or to support a judgment against respondent applies to the entire complaint and is sufficient to bring about the dismissal of the amended complaint and of the action if sustained by the state court.

Subparagraph 2 of Section 33 of the Civil Practice Act of Illinois is as follows:

> "Section 33. (Form of pleadings.) * * *
>
> (2) Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation."

Examination of the above quoted subparagraph 2 of Section 33 shows it to be mandatory and that failure of the plaintiffs to comply with its requirements would likewise constitute sufficient grounds for striking the amended complaint, and dismissing the action. If the Court is disposed to examine the amended complaint (R. 20) it will be obvious that both objections to the pleading raised by respondent were well taken. In this connection it is likewise to be borne in mind that plaintiffs' first complaint had been dismissed by the Superior Court with leave to amend (R. 20).

The attention of the Court is called to the order of the Superior Court, entered April 10, 1939, (R. 57) dismissing the amended complaint, the first paragraph of which states:

> "(1) Each and every motion to strike the amended bill of complaint be and the same is hereby sustained."

The order of the Superior Court of Cook County sustaining all of the motions to strike the amended complaint and dismissing it was fully affirmed by the Appellate Court of Illinois in its ruling:

> "We have presented the affirmative reasons why in our opinion the orders of the Superior Court sustaining the motions to strike plaintiffs' amended complaint and dismissing it were proper, and they are affirmed." (Pet. to Ill. Sup. Ct. 8 and 9.)

It has been consistently maintained by this Court that in order to give this Court jurisdiction over a case decided in the state court it must appear affirmatively by the record not only that a federal question was presented for decision, but that its decision was necessary to the rendition of a decree.

Williams v. *Oliver,* 12 How. 55;
Eustis v. *Bolles,* 150 U. S. 361;
Adams v. *Russell,* 229 U. S. 353.

In *Williams* v. *Oliver, supra,* this Court stated at page 60:

"In order to give jurisdiction to this Court to revise the judgment of a state court, under the 25th Section of the Judiciary Act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or in the language of some of the cases on the subject, 'the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of Congress, or a decision against the validity of the right, title, privilege or exemption set up under it'. 3 Pet. 292, 302." quoting from Mr. Justice Story's opinion in *Harris* v. *Dennie.*

In *Eustis* v. *Bolles, supra,* this Court stated at page 366:

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the latter question is sufficient notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

In *Adams* v. *Russell, supra,* this Court, in holding that where both federal and state questions were raised in the

trial court and the state questions were sufficient to support the decision of the state court, the Supreme Court must assume that the state court based its decision on the state questions, adopted, at page 358, the ruling of this Court in *Eustis* v. *Bolles, supra,* in the following language:

> "In *Eustis* v. *Bolles,* 150 U. S. 361, it is decided that when there is a federal and a state question in the case and the latter is sufficient to sustain the judgment, this Court will not review the judgment."

This Court is without jurisdiction to review the judgment of a state court based not only upon ground involving federal questions, but also upon an independent ground of state procedure involving no federal question and sufficient to sustain a judgment.

People ex rel. Doyle v. *Atwell,* 261 U. S. 590;
Richardson Machinery Co. v. *Scott,* 276 U. S. 128, 133 (1928);
Johnson v. *Thornburg,* 276 U. S. 601 (1928);
Carter Oil Co. v. *Eli,* 277 U. S. 573 (1928);

In *People ex rel. Doyle* v. *Atwell, supra,* this Court stated at page 592:

> "It is well settled law that where the record discloses that the judgment of a state court was based, not alone upon the ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this Court will *not* take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose." (Italics ours.)

Where it is not apparent on which ground the judgment of the state court was based, nevertheless if the independent ground was good and valid and sufficient to support the judgment, this Court will not assumejurisdiction.

Klinger v. *Missouri,* 80 U. S. 257 (13 Wall. 257).

In *Klinger* v. *Missouri, supra,* this Court stated, at page 262:

> "For we do not assume jurisdiction to review the judgment of a state court unless it clearly appears from the record that a question has been raised and passed upon which is within the cognizance of this Court * * *".

Again at page 263 the Court states:

> "Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, the Court will *not* take jurisdiction of the case even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment this Court will *not* assume jurisdiction of the case; * * *" (Italics ours.)

The motions to strike certain paragraphs and the plea of *res judicata* as to two of the alleged causes of action set forth in the amended complaint did not and could not constitute sufficient grounds for the striking of the entire amended complaint, and the dismissal of the entire cause of action. It, therefore, is obvious that the state court, even without special phraseology so indicating, must have considered and sustained the other objections raised by respondent. Examination of the opinion of the Appellate Court shows that it did consider the objections raised by respondent and the other defendants to the amended complaint other than *res judicata* and that it sustained them. (Pages 7, 8 and 9 of the opinion of the Appellate Court.)

2. None of the cases cited by petitioners are authority for petitioners to maintain that this Court should take jurisdiction of the instant case.

Examination of the cases cited by petitioners in support of their claim that the jurisdiction of this Court may be invoked shows that in each instance a federal question was passed upon and was the basis of the state court's decision. We shall review part of the cases cited by petitioners briefly.

Cumberland Glass Co. v. *DeWitt,* 37 U. S. 447. In this case three pleas were made by the defendant, one a denial, one a bar of the Statute of Limitations, and third, the bar of a decision of a federal court of bankruptcy as *res judicata.* None of the pleas were sustained. This Court took jurisdiction because of the refusal of the state court to sustain the plea that the decision of the federal bankruptcy court was *res judicata.*

Had either of the first two pleas been sustained, the defense would have been sufficient and the state court's decision would not have been reviewable. Not having been sustained, the refusal by the state court to give effect to the decision of the federal court on the claim of its being *res judicata* was sufficient to invoke the jurisdiction of this Court. In the instant case the petitioners' action was dismissed upon other and independent grounds and the question of whether proper effect was given to decree of the District Court is not before the Court.

Indiana v. *Brand,* 303 U. S. 95. In this case the constitutional question was raised and passed upon by the state court (p. 98). It likewise appears that the state court did not pass upon the first ground of demurrer raised by the defendant, which raised an independent local question. At first blush it would appear that the decision in this case is contrary to the trend of decisions which we have quoted heretofore. Examination of the opinion, however, shows that this Court did not disregard the fact of there being an independent ground for decision and did not hold that

because it had not, apparently, been passed upon by the state court such independent ground might be disregarded. At page 98 this Court states:

> "Where the state court does not decide against the petitioner or appellant upon an independent state ground, but deeming the Federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground. * * * *As the court below has not passed upon one of the grounds of demurrer which appears to involve no federal question, and may present a defense still open to the respondent, we reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.*" (Italics ours.)

It therefore appears that despite the fact that this Court took jurisdiction of the case, it did not eliminate from consideration the independent question but remanded the case for consideration of that question by the state court.

Stoll v. *Gottlieb,* 305 U. S. 167. This case hinged completely upon the question of whether or not a decision of the Federal District Court should be given effect, the state court's refusal to give it effect made it reviewable in this Court.

Scott v. *McNeal,* 154 U. S. 34. This was a case in which the state court enforced a statute of the state which was repugnant to the Federal Constitution and this Court, of course, held that because the state statute was itself contrary to the Federal Constitution, the decision of the state court in accordance with that statute was reviewable. It is interesting in this connection to note the statement of the Court at page 38:

> "If a statute regulating probate proceedings is itself constitutional, the decision of the state court of last resort that the provisions of such statute have been complied with in a given cause is conclusive."

None of the other cases cited by petitioners in support of their effort to invoke the jurisdiction of this Court differ in theory from the foregoing and so will not be reviewed. None deviated from the long established principle that when the decision of the state court was based upon some ground other than one involving a federal question, sufficient to support the judgment, the jurisdiction of this court may not be invoked.

3. Whether or not the plea of res judicata raised by this respondent was sufficient is, as to it, immaterial to the instant petition.

Examination of the respondent's motion to strike (R. 57) shows that the plea of *res judicata* was raised as to only the alleged causes of action set forth in paragraphs 5, 7 and 17 of the amended complaint (R. 25, 27 and 36), and as an alternative that the matters set forth in paragraphs 6 and 8-16 inclusive (R. 26, 28-36) be stricken, whereas the motion to dismiss for failure to state a cause of action and for failure to comply with the Civil Practice Act of the State of Illinois attacked the entire amended complaint upon grounds sufficient if sustained by the court to require the striking of the amended complaint and the dismissal of the suit. It therefore becomes unnecessary, in view of the decisions of this Court above cited, to discuss the question of whether the plea of *res judicata* was sufficient and whether if it were the only ground upon which the motions to dismiss had been sustained the order of the state court might be reviewed here.

CONCLUSION.

The action of the state court in striking the amended complaint herein and dismissing the case, upon motion of respondent, was upon grounds adequate and sufficient to sustain its order, independent of any grounds involving a federal question and is not reviewable here, and no reason exsits for invoking the jurisdiction of this Court.

We, therefore, urge that the petition for writ of certiorari be denied, with costs.

Respectfully submitted,

CLAIRE W. HARDY,
Attorney for Respondent,
A. C. ALLYN AND COMPANY.